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In the Supreme Court of the United States

OCTOBER TERM, 1959

MAURICE E. TRAVIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The majority (Pet. App. A, pp. 47–75) and dissenting (*id.*, pp. 76–77) opinions in the Court of Appeals are reported at 269 F. 2d 928, 946. The majority (Pet. App. B, pp. 78–87) and concurring (*id.*, p. 87) opinions of the Court of Appeals reversing petitioner's conviction following his first trial are reported at 247 F. 2d 130, 136.

JURISDICTION

The judgment of the Court of Appeals was entered on August 3, 1959 (Pet. App. D, p. 93), and a petition for rehearing was denied on August 21, 1959. On September 8, 1959, Mr. Justice Whittaker entered an

order extending the time for filing a petition for a writ of certiorari to and including October 20, 1959, and the petition was filed on October 16, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the venue of petitioner's trial was properly laid in the United States District Court for the District of Colorado.

2. Whether the so-called "two witness" rule in perjury cases applies to a prosecution under the "false statement" statute (18 U.S.C. 1001) for filing a false non-Communist affidavit.

3. Whether the evidence is sufficient to support the verdict.

4. Whether inadmissible evidence was improperly received and cross-examination was prejudicially limited.

5. Whether petitioner was prejudicially deprived of any pre-trial statements of government witnesses by the trial court's rulings as to the application of 18 U.S.C. 3500.

6. Whether the trial court's instructions to the jury on the meaning of the terms "membership" and "affiliation" were correct and sufficiently informed the jury of the meaning of those terms.

7. Whether the trial court abused its discretion in denying petitioner's motions for production of grand jury testimony.

STATUTES INVOLVED

The pertinent statutory provisions (18 U.S.C. 1001; Sections 9(h) of the National Labor Relations Act, as amended by the Labor Management Relations Act of 1947, c. 120, § 101, 61 Stat. 136, 146 (29 U.S.C. 159(h));[1] Section 5 of the Communist Control Act of 1954, c. 886, § 5, 68 Stat. 777 (50 U.S.C., 1952 ed., Supp. V, 884); 18 U.S.C. 3500; 18 U.S.C. 3237) are set forth in Appendix C to the petition, pp. 88–92.

STATEMENT

Petitioner was charged, in four counts of a six-count[2] indictment (R. 3–6) returned in the United States District Court for the District of Colorado, with violation of 18 U.S.C. 1001, in that he falsely attested, in two affidavits executed on December 19, 1951, and December 3, 1952, and thereafter filed with the National Labor Relations Board, that he was not a member of (Counts I and IV) or affiliated with (Counts II and V) the Communist Party.

Following a jury trial, petitioner was found guilty on these four counts, but his conviction was reversed

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[1] Section 9(h) was repealed on September 14, 1959, by Section 201(d) of the Labor-Management Reporting and Disclosure Act of 1959, Public Law 86–257, 73 Stat. 519. Section 504(a) of the new Act provides that no person who is or has been a member of the Communist Party may hold office in a labor organization or association of employers dealing with a labor organization during or for five years after the termination of his membership in the Communist Party.

[2] Two counts of the indictment, charging that petitioner falsely denied support of the Communist Party in each of two separate affidavits, were dismissed on motion of the Government prior to petitioner's first trial (R. 19).

and a new trial ordered on the ground that the trial court had permitted improper cross-examination of petitioner's character witnesses. *Travis* v. *United States*, 247 F. 2d 130 (C.A. 10); Pet. App. B, pp. 78–87. Upon a retrial, petitioner was again convicted on all four counts (R. 30). On appeal, the Court of Appeals affirmed his conviction (Pet. App. A, pp. 47–75), one judge dissenting (*id.*, pp. 76–77).[3]

The evidence adduced by the Government at petitioner's second trial may be summarized as follows:

Both affidavits were executed by petitioner as a national officer of the International Union of Mine, Mill and Smelter Workers, were mailed in Denver, Colorado, and were received by and filed with the National Labor Relations Board in Washington, D.C. The making and filing of the affidavits is a matter within the jurisdiction of an agency of the United States Government, *viz.*, the National Labor Relations Board. During the life of the affidavits, the Mine-Mill Union was in compliance with subsections (f), (g) and (h) of Section 9 of the National Labor Rela-

[3] Judge Murrah, who dissented, was of the opinion that the perjury rules of evidence—*i.e.*, that falsity must be established by two independent witnesses or by one witness and corroborating circumstances—are applicable to prosecutions, like petitioner's, under 18 U.S.C. 1001 for filing false non-Communist affidavits but, feeling bound by the decision of the court below in *Sells* v. *United States*, 262 F. 2d 815, 821–822, he did not rest his dissent on this ground (Pet. App. A, p. 76). He would have reversed on the ground that the trial court committed prejudicial error in refusing to inspect *in camera* the grand jury minutes of the testimony of three prosecution witnesses to determine whether such minutes should be turned over to the defense for impeachment purposes (*id.*, pp. 76–77).

tions Act, as amended by the Labor Management Relations Act of 1947 (29 U.S.C. 159 (f), (g) and (h)) (R. 43–46, 48–50; G. Ex. 1–6).

Petitioner, from 1942 through 1948, was an active, disciplined, and dedicated member of the Communist Party who played a leading role in formulating its policies, especially with respect to its program of infiltration into labor organizations (R. 75–84, 95–140, 160). During this same period, petitioner progressed steadily to positions of prominence and leadership within the Mine-Mill Union. Party co-ordinator of the Union in Northern California in 1942 (R. 75–76), he became Assistant to the President in 1946, Vice-President in 1947, and President later in the same year. In 1948, he became Secretary-Treasurer of the Union, a position he held at the time of trial (R. 604–605).

Petitioner's Party activities were intertwined with his activities as an officer of Mine-Mill. In 1946, the Communist Party designated a group of its members who were prominent Mine-Mill leaders (including petitioner) to co-ordinate the Party's activities within the Union (R. 80). This group, which was not an official organization of Mine-Mill, became known as the "Steering Committee" and its frequent meetings were usually presided over by petitioner "or some other ranking Communist official" (R. 81–84). Through the operation of the "Steering Committee," the Party was able to gain control of the Executive Board of Mine-Mill and influence its decisions (R. 99–107) and to plan strategy, often successful, for the

election of Party-approved candidates for international offices in the Union (R. 107–114).

In February 1948, following the enactment of Section 9(h) by the Labor Management Relations Act, a large group of leading Party members who held union offices, including petitioner, met in New York City. After an extended discussion of the problem, they decided that the Party's policy would be against compliance with the non-Communist affidavit provisions of the new Act (R. 126–130). Though personally opposed to this decision, petitioner, accepting the discipline of the Party, decided that he and other Communist officers of Mine-Mill should abide by it (R. 130–131). At a meeting of Party Mine-Mill leaders which petitioner attended shortly thereafter, various means of circumventing the law were discussed, including the organization by Communist labor leaders of "Thursday afternoon social club[s]" (R. 133). At the same meeting, it was pointed out that Communists working inside labor unions should remain in them at all costs and should, if necessary, use artifice and device to remain active in the labor movement (R. 132).

In accordance with the Party's position, the Executive Board of Mine-Mill, then controlled by petitioner and other Party members, decided that the Union would not require that its officers file non-Communist affidavits with the Labor Board (R. 606, 608, 140). This position, however, substantially impaired the Union's ability to compete with other unions (R. 611). Accordingly, in July 1949, the Mine-Mill Executive

Board, by resolution, reversed its previous position and adopted a policy of compliance (R. 610).

Shortly thereafter, petitioner showed government witness William Mason a copy of a statement purporting to evidence his resignation from the Party. He told Mason that the statement had been "cleared with * * * Party people in New York" and that "the Party thinks this is the best policy for us in the unions to follow" (R. 612–613). The August 15, 1949, issue of the Union paper contained an article by petitioner announcing that he had "resign[ed] from the Communist Party" "in order to make it possible for me to sign the Taft-Hartley affidavit" (G. Ex. 8, R. 1249). Government witness Kenneth Eckert testified that, based upon his experience in the Communist Party from 1931 to 1948, "the policy of the Party" was that "once having joined the Communist Party you could not leave without being expelled" (R. 196).

Following his purported resignation from the Communist Party in August 1949, petitioner made various comments or statements to government witnesses William Mason and Fred Gardner. Gardner testified, for example, that in the fall of 1951 (shortly before the execution and filing of petitioner's first affidavit but after his purported resignation) petitioner confided to him that his formal resignation from the Party in 1949 was a "mistake" because it had provided the "enemies of the Party" with an opportunity to point out that it was not a "true" resignation (R.

587–590, 591).[4] Other admissions bearing on continued Party membership, set forth in detail in the opinion of the court below (Pet. App. A, pp. 53–55), were made by petitioner to either Gardner or Mason in March 1952 (R. 615–618); and in March (R. 618–620), June (R. 519–594), and August (R. 624–633) 1953, after one or both of the dates his affidavits were filed with the National Labor Relations Board in December 1951, and December 1952.

ARGUMENT

1. Petitioner contends (Pet. 40–44) that the proper venue of his trial was not, as the court below held in its opinion reversing his first conviction (Pet. App. B, pp. 78, 81–83, 247 F. 2d 130, 133–134), in the District of Colorado, where he executed and mailed the two false affidavits to the National Labor Relations Board, but only in the District of Columbia, where the affidavits were received and filed with the Board (see R. 42–50; G. Ex. 1–6, R. 1242–1247).

Venue, however, was properly laid in the District of Colorado. Section 3237 of Title 18 of the United States Code, the so-called "continuing offense" statute, provides:

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[4] This testimony reads in pertinent part (R. 590):

"* * * we very briefly discussed his resignation from the Party in which he pointed out that he believed that resignation, that public resignation was a mistake because it gave the enemies of the Party an opportunity to use that in pointing out that his wasn't a true resignation from the Party, that actually it was done merely to conform to Taft-Hartley affidavits, and they recognized, the enemies of the Party recognized that this was not an actual resignation, and in substance that is about what we discussed. * * *"

> Except as otherwise expressly provided by enactment of Congress, any offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed.

This case, as the court below held (247 F. 2d at 134; Pet. App. B, p. 83), falls within that language. The execution and mailing of the false affidavits in Colorado was the beginning of petitioner's illegal acts. Once he relinquished all control over the affidavits, his acts were complete; at that juncture he had set in motion a chain of events culminating in the completion of the offense, *i.e.*, the filing of the false affidavits with the Board in Washington, D.C. The offense was begun in one District—Colorado—and completed in another—Washington, D.C.—and venue lay in both districts. See *United States* v. *Lombardo*, 241 U.S. 73.[5] Cf. *De Rosier* v. *United States*, 218 F. 2d 420, 422 (C.A. 5) (sustaining a prosecution under 18 U.S.C. 1001 brought in the district where the false statement was mailed); *Bridgeman* v. *United States*, 140 Fed. 577, 591 (C.A. 9).

Petitioner is correct in asserting that there is a conflict with the decision of the Third Circuit in *United*

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[5] In *Lombardo*, this Court stated (p. 77):

"* * * where a crime consists of distinct parts which have different localities the whole may be tried where any part can be proved to have been done; or where it may be said there is a continuously moving act commencing with the offender and hence ultimately consummated through him, *as the mailing of a letter* * * *." (Emphasis added.)

States v. *Valenti*, 207 F. 2d 242, a Section 9(h) case in which it was held that the offense is triable only at the place where the false affidavit is received by the Board. We submit, however, that this conflict has no substantial future significance in view of the fact that Section 9(h) was repealed by Congress on September 14, 1959 (Labor-Management Reporting and Disclosure Act of 1959, Public Law 86-257, 73 Stat. 519, Sec. 201(d)) and that it does not require resolution by this Court.

Petitioner states that there are extensive reporting provisions under the new statute (which is true), but ignores the fact that the reasoning of *Valenti* will not apply to those provisions. *Valenti* turns on the point that under Section 9(h) union officials were not required to file affidavits at all (though the failure to do so had consequences for the union). The court reasoned (1) that "there is no duty imposed upon union officers to make or file noncommunist affidavits" (p. 244); (2) that, accordingly, "until the affidavit has been delivered to the Board to be placed 'on file'" the matter is one "not yet * * * within the jurisdiction of the Board" (*ibid.*); and (3) that, since the "false statements" statute applies only to matters "within the jurisdiction of any department or agency of the United States," it does not come into play until the actual receipt of an affidavit submitted under Section 9(h).[6] In contrast to Section 9(h), the reporting provisions of the new statute are mandatory and there

[6] Judge Hastie concurred in the *Valenti* decision on the limited ground that the Government had not adequately shown that the mailing occurred in the district where venue was laid.

is thus, on the Third Circuit's own reasoning, a breach of statutory duty as soon as the reporting party engages in the initial act of making a false report.

2. There is no merit to petitioner's various arguments (Pet. 11–19) addressed to the sufficiency of the evidence.

(*a*) Petitioner contends (Pet. 11–14) that he was erroneously convicted on the basis of circumstantial evidence and that the rule of evidence applicable in prosecutions for perjury under 18 U.S.C. 1621—*i.e.*, that the falsity of the statements must be established by two independent witnesses or by one witness and corroborating circumstances [7]—is likewise applicable to prosecutions under 18 U.S.C. 1001. However, the decisions uniformly hold that the so-called "two witness" perjury rule is inapplicable to prosecutions under the so-called "false statement" statute. See *Sells* v. *United States*, 262 F. 2d 815, 821–822 (C.A. 10), certiorari denied, 360 U.S. 913; *United States* v. *Killian*, 246 F. 2d 77, 82 (C.A. 7), reversed on rehearing on other grounds, 246 F. 2d 82; *Gold* v. *United States*, 237 F. 2d 764 (C.A.D.C.), reversed on other grounds, 352 U.S. 985; *Fisher* v. *United States*, 231 F. 2d 99, 105–106 (C.A. 9). See, also, *Hupman* v. *United States*, 219 F. 2d 243, 247 (C.A. 6), certiorari denied, 349 U.S. 953 (holding that a violation of 18 U.S.C. 1001 for filing a false non-Communist affidavit may be proved by circumstantial evidence). As the court below noted in the *Sells* case, *supra*, at p. 822:

[7] See *Weiler* v. *United States*, 323 U.S. 606, holding that conviction for perjury may not rest on uncorroborated testimony of a single witness, and that the jury must be so instructed.

> The application of the perjury rule to a prosecution for violation of § 1001 by a false non-communist affidavit would merely thwart the attainment of the end which Congress sought to accomplish by the enactment of § 9(h). An essential element of "membership" is the desire of an individual to belong to an organization. Affiliation imports less than membership but more than sympathy and requires "an adherence to or a furtherance of the purposes or objectives of the proscribed organization as distinguished from mere cooperation with it in lawful activities." Desire to belong and an intent to adhere and further rather than merely sympathize are mental states. They can and must be proved or disproved by circumstantial evidence. A requirement of direct proof is a requirement of the impossible. * * *

(*b*) There is likewise no merit to petitioner's contention (Pet. 14–16) that his conviction below violated the rule, enunciated in *Opper* v. *United States,* 348 U.S. 84, that a conviction may not be based on uncorroborated extra-judicial admissions of the accused made after the alleged commission of an offense. To begin with, *Opper* does not appear to be applicable to the type of "admissions" made by petitioner in the instant case. The *Opper* case dealt with the quantum of evidence, corroborative of an extra-judicial admission or confession made to *law-enforcement authorities,* required to sustain a conviction. The requirement that there be some such corroborative evidence (see *Opper, supra,* at pp. 92–93) is founded on the law's concern lest a conviction be based solely on an

untrue admission or confession induced by fear, coercion, or hope of leniency. 3 Wigmore, *Evidence* (3d ed. 1940), §§ 821, 822; 7 *id.*, § 2071; 2 Wharton, *Criminal Evidence* (12th ed. 1955), §§ 393–394, 372–383; *Bram* v. *United States*, 168 U.S. 532, 562–564; *Wilson* v. *United States*, 162 U.S. 613, 622–623; *Opper* v. *United States*, *supra*, at pp. 89–90; *Smith* v. *United States*, 348 U.S. 147, 153. Petitioner's "admissions" were of an entirely different kind; they were made prior to arrest and to private individuals, rather than to law-enforcement authorities.

Moreover, in any event, petitioner's admissions were amply corroborated by the extensive evidence of his activities as a Party member (see, *supra*, pp. 5–7; Pet. App. A, pp. 48–53).

(*c*) Petitioner argues (Pet. 18–19) that his false statements were not shown to be material in the absence of evidence that his union actually utilized the facilities of the National Labor Relations Board after it was placed in compliance by the latter as a result of its filing of the required documents (including petitioner's affidavits). As the court below pointed out (Pet. App. A, p. 57), however, "[t]he materiality of the false statement is tested not by the union's use of the N.L.R.B.'s facilities but by the Union's achievement thereby of a status which carries with it the right to invoke the benefits of the National Labor Relations Act." This status, once achieved by the filing of the required affidavits, is irrevocable, even if some or all of the affidavits later prove to be false. *Leedom* v. *International Union of Mine, Mill & Smelter Workers*,

352 U.S. 145; *Amalgamated Meat Cutters & Bucher Workmen of North America* v. *National Labor Relations Board*, 352 U.S. 153. "The test is not use but right to use." *Sells* v. *United States*, 262 F. 2d 815, 819 (C.A. 10), certiorari denied, 360 U.S. 913.

(*d*) As to petitioner's general attack upon the sufficiency of the proof (Pet. 14–18), we submit that the jury was fully justified in finding, on the basis of uncontradicted evidence reviewed at length by the court below (Pet. App. A, pp. 48–57), that petitioner's pre-1949 membership in the Party was not terminated by his purported resignation. In light of the careful review of the evidence reflected in the opinion below, there would certainly appear to be no occasion for a second review of the record in this Court.

3. Petitioner urges (Pet. 33–40) that prosecution evidence was erroneously received and that his cross-examination of prosecution witnesses was improperly restricted.

(*a*) It is argued (Pet. 33–35) that government witness Eckert was improperly permitted to testify that, during his membership in the Communist Party from 1931 to 1948, "[t]he policy of the Party" was that "once having joined * * * [it] you could not leave without being expelled" (R. 196). The Court of Appeals correctly held that the evidence "was probative of the second side of the question of membership, *i.e.*, whether the Party was willing to accept the defendant and recognize him as a member (Pet. 34)." Since acceptance of membership by the organization is an "essential element of membership in an organized

group" (*Jencks* v. *United States*, 353 U.S. 657, 679 (concurring opinion of Mr. Justice Burton)), the evidence was properly admitted.[8] The jury, whether or not it believed Eckert, was, of course, free to find, if it chose, that petitioner, from his side, had severed the connection with the Party.

(*b*) Petitioner also argues (Pet. 35–40) that the trial court improperly restricted his cross-examination of prosecution witnesses: first, that it was error for the trial court to terminate a line of inquiry which, in petitioner's view, tended to show that witness Mason had become an informant for the FBI and was testifying against him because he (Mason) feared denaturalization and deportation; secondly, that the trial court erred in refusing to permit petitioner to cross-examine witnesses Eckert and Gardner concerning alleged rivalries between the labor organizations by whom they were employed and Mine-Mill, petitioner's union. We believe that in both instances the trial court properly exercised its discretion.

The extent of cross-examination upon collateral matters is a matter peculiarly within the sound discretion of the trial court. *Glasser* v. *United States*, 315 U.S. 60, 83; *Alford* v. *United States*, 282 U.S. 687, 694. The facts and circumstances surrounding the rulings of the trial court are set forth in detail in the opinion below (Pet. App. A, pp. 61–

[8] The opinion below sets forth in detail evidence from which the jury could reasonably have inferred that petitioner had knowledge of the Party's policy against resignations (Pet. App. A, pp. 58–60). See, also, R. 126–130, 132, 590, 612.

62, 64–65) and we shall deal with them only briefly here.

As the Court of Appeals pointed out (Pet. App. A, p. 64), "[t]he inference that the witness Mason was coercively influenced to testify by a power over him held by immigration officials requires imagination to be applied in disparagement of facts appearing in the record." The evidence and offer of proof made by the defense tended to indicate not only that Mason could not have been denaturalized, but that there was hardly a reasonable basis for fear on Mason's part that the Government might conceivably seek to effect his denaturalization. It affirmatively appeared that Mason had not concealed his past membership in the Communist Party (see R. 936–939), that he did not procure his naturalization by fraud, and that consequently he could neither be denaturalized nor deported.[9]

The trial court's refusal to permit petitioner to cross-examine Eckert and Gardner concerning alleged rivalries between their unions and Mine-Mill, on the ground that the inquiry was too remote and would lead to a needless protraction of the trial in relation to a collateral matter (R. 815–816), was also a proper exercise of judicial discretion. The significant con-

[9] The Immigration and Nationality Act provides for the denaturalization of naturalized citizens only (so far as is here pertinent) where the naturalization certificate has been procured by fraud (8 U.S.C. 1451); the 1950 provision making past membership in the Communist Party a ground for deportation applies exclusively to aliens (8 U.S.C. 1251(a)(6)(C)(i); see *Galvan* v. *Press*, 347 U.S. 522).

sideration is that organizational rivalry, even if established, would fall far short of a showing of personal hostility, revealing bias or partiality.

4. Petitioner claims that the trial court improperly applied 18 U.S.C. 3500 (the "Jencks Act") in ruling on his requests for production of pre-trial statements of the three government witnesses (Pet. 30–33).

Statements made by the witnesses to agents of the F.B.I. were made fully available to the defense (following excision by the court of irrelevant portions).[10] Error is claimed, however, because the United States Attorney took the position, when the defense suggested that there might be other types of statements in existence, *i.e.*, statements made to government attorneys or to Congressional investigators, that such persons would not be "agent[s] of the Government" within the meaning of 18 U.S.C. 3500. An argument that this view was erroneous does not establish that petitioner was prejudiced.

In the first place, the United States Attorney also advised the court that the United States possessed no statements made to attorneys (R. 202), and that the Executive Branch had no statements (if any

[10] Petitioner argues (Pet. 30) that the trial judge erroneously ruled that the prosecution, rather than the court, should determine whether a writing is a "statement" within the definition appearing in 18 U.S.C. 3500(e). But the court's comments on this point were made in the context of a determination that it would turn over to the defense all of the statements tendered by the Government even if the Government's tender of F.B.I. material was broader (as, indeed, it was) than the statute required. See R. 636–641.

existed) which might have been made to Congressional personnel (R. 201).

In the second place, the court did not subscribe to the United States Attorney's legal argument or let the matter rest there (see R. 319–331). The trial judge permitted defense counsel (outside the presence of the jury) to question the witnesses sought to be impeached in order to determine whether there might be pre-trial statements other than the F.B.I. statements which had been produced. As pointed out in the opinion of the Court of Appeals (Pet. App. A, p. 73):

> * * * the record shows merely that the three witnesses, Eckert, Mason, and Gardner, had talked with government attorneys in preparation for this case and that Eckert had talked to an investigator for a congressional committee. The subject of these conversations was Travis and Mine-Mill, but there is nothing in the record to indicate that these witnesses had in these instances written, signed, adopted or approved any writing or that any recording was made of any oral statement made to these agents. It is presumed that these agents took notes or made summaries of their conversations with the witnesses but such interpretations would not be "statements which could properly be called the witness' own words," *Palermo* v. *United States*, and the witnesses denied signing or adopting any such statements.

If petitioner had wished to pursue the matter still further, he might have done so by calling the persons

who had interviewed the witnesses. He did not choose to do so.

In these circumstances, we submit that there is no showing of prejudice and no basis for believing that petitioner did not receive all pre-trial statements.[11]

5. Petitioner contends (Pet. 20–25) that the trial court erred in its instructions to the jury on the issues of membership in and affiliation with the Communist Party and in refusing the charge requested by petitioner on these issues.

(*a*) The first argument (Pet. 20–23) is that the membership instruction—insofar as it allowed the jury to consider 11 of the 14 enumerated criteria of membership set forth in Section 5 of the Communist Control Act of 1954 (50 U.S.C., 1952 ed., Supp. V, 844)—was objectionable on constitutional grounds because it permitted a finding of guilt on the basis of vague and indefinite standards. We submit that the eleven items listed by the trial court, though not determinative, were plainly relevant considerations which any jury would have to consider in resolving the ultimate factual issue before them, *i.e.*, whether petitioner was or was not a member of the Communist Party on the critical

[11] Petitioner's further suggestion that the Jencks Act could not properly be applied at his trial because he was indicted prior to its adoption is obviously untenable in the face of this Court's disposition of *Palermo* v. *United States*, 360 U.S. 343, and *Rosenberg* v. *United States*, 360 U.S. 367.

dates.[12] We point out, moreover, that the judge made clear that these were not the only indicia of membership; that the jury would have to weigh all of the relevant evidence; and that the Government's proof was required to be proof beyond a reasonable doubt (R. 1228–1230).

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[12] The pertinent portion of the instruction is as follows (R. 1229):

"In determining whether or not the defendant was a member of the Communist Party at the times alleged in the indictment, you may take into consideration whether the defendant: 1. Has made himself subject to the discipline of the Communist Party in any form whatsoever; 2. Has executed orders, plans, or directives of any kind of the Communist Party; 3. Has acted as an agent, courier, messenger, correspondent, organizer, or in any other capacity in behalf of the Communist Party; 4. Has conferred with officers or other members of the Communist Party in behalf of any plan or enterprise of the organization; 5. Has been accepted to his knowledge as an officer or member of the Communist Party or as one to be called upon for services by other officers or members of the organization; 6. Has written, spoken or in any other way communicated by signal, semaphore, sign, or in any other form of communication orders, directives, or plans of the Communist Party; 7. Has prepared documents, pamphlets, leaflets, books, or any other type of publication in behalf of the objectives and purposes of the organization; 8. Has mailed, shipped, circulated, distributed, delivered, or in any other way sent or delivered to others material or propaganda of any kind in behalf of the organization; 9. Has advised, counseled or in any other way imparted information, suggestions, recommendations to officers or members of the Communist Party or to anyone else in behalf of the objectives of the organization; 10. Has indicated by word, action, conduct, writing or in any other way a willingness to carry out in any manner and to any degree the plans, designs, objectives, or purposes of the organization; 11. Has in any other way participated in the activities, planning, actions, objectives, or purposes of the organization."

(*b*) The trial court's instructions on the meaning of "membership" and "affiliation" (R. 1228–1230) are set forth verbatim in the opinion of the court below (Pet. App. A, pp. 66–68, n. 13). As the Court of Appeals stated (Pet. App. A, p. 68), they were "meaningful and clear" and fully in accord with previous pronouncements of this Court and other federal appellate courts. See *Jencks* v. *United States*, 353 U.S. 657, 679–680 (concurring opinion); *Galvan* v. *Press*, 347 U.S. 522, 528–529; *Bridges* v. *Wixon*, 326 U.S. 135, 142–144; *Lohman* v. *United States*, 251 F. 2d 951, 953–954 (C.A. 6); *Fisher* v. *United States*, 231 F. 2d 99, 106–108, 107, n. 2 (C.A. 9). See, also, *Travis* v. *United States*, 247 F. 2d 130, 135–136 (C.A. 10) (Pet. App. B, pp. 85–87).

6. We turn finally to petitioner's contention that the grand jury testimony of the three government witnesses should have been made available to the defense or inspected by the court (Pet. 26–30).

Petitioner urges, in this connection, that there was an adequate showing of need for production or inspection because there were variations between the trial testimony of the government witnesses and statements or testimony given by those witnesses on various other occasions. There were, to be sure, variations—human memory is rarely a perfect instrument—but we dispute the suggestion that the variations were significant, that they were material, or

that they were of a kind other than that which one would normally expect in the case of a witness seeking to recall details. We rely upon the appraisal of the Court of Appeals, which has examined the testimony in full and in context (Pet. App. A, p. 75):

> * * * In view of prior statements of these witnesses made available to the defense, in which there appeared no suggestion of material inconsistency, it is unlikely that their statements to the grand jury occurring at a time between the giving of such statements and consistent statements upon trial would produce impeaching material. Appellant shows inaccuracies in the testimony of the witnesses (i.e. Gardner thought he had testified in another case the prior week but actually it was two weeks earlier; Eckert had testified on seven previous occasions against Mine-Mill but his testimony as to details was not precisely the same on each occasion; Gardner's evidence at trial was not shown on the reports which he made to the F.B.I.; Mason stated to the F.B.I. that he was "unable to enlarge" on information about appellant, but at trial gave other specific information); these inaccuracies might well give rise to argument concerning the witnesses' memories and powers of observation which were available to the defense from the materials produced by the government. They do not demonstrate a reason for believing that the witnesses' testimony was biased or impeachable on material. They

do not compel the conclusion that the testimony before the grand jury requires further investigation.

Petitioner also contends that rulings of the District Court impeded his efforts to ascertain from the Government's witnesses how they had testified in the course of grand jury proceedings. Thus, the petition states (pp. 26–27): "When the defense asked the witnesses whether they had testified before the grand juries about the episodes to which they had testified on direct examination and even whether they had testified about petitioner before the grand juries at all, the trial judge sustained the objections of the government (R. 540, 698–701, 704, 873–74)." But it appears that in the instances cited by petitioner objections were sustained because the trial court concluded that the questions were improper in form, scope or purpose. There is no need to debate the correctness of the particular rulings. A complete answer to petitioner's claim is that at numerous other points in the record (to which petitioner has not referred) petitioner did ask each of the Government's witnesses whether they had testified before grand juries in relation to Travis and that the questions were allowed and were answered by each of those witnesses. See the excerpts set forth in the Appendix, *infra*, pp. 26–33. In no instance did petitioner seek to go further and to ask the witnesses concerned whether there was inconsistency as between their trial testimony and their grand jury testimony. See R. 249, 251, 383, 397, 399, 469, 657, 811, 876, 962, 964–965. Accord-

ingly, petitioner has no sound basis for claiming that restrictive rulings as to permissible cross-examination impaired his opportunity to show a particularized need for grand jury inspection.[13]

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[13] We do not agree with petitioner that the Second Circuit has adopted the view that inspection of grand jury minutes by the trial judge is mandatory whenever the defense requests it. Assuredly, there is some measure of discretion. One of the most recent pronouncements of the Second Circuit states (*McKeever* v. *United States*, November 10, 1959): "In this Circuit the procedure whereby grand jury testimony may be made available to the defense is well established. After a government witness has testified on direct examination, if there appears to be some basis for supposing that his grand jury testimony may be at variance with his trial testimony, the defense may ask the trial judge to examine the witness' grand jury testimony. If the trial judge finds any material discrepancy between the trial testimony and the grand jury testimony, such part of the minutes is made available to the defendant." The reference to "some basis for supposing" obviously means something more than a bare theoretical possibility of variance (which would always exist in the case of every witness who had previously testified before the grand jury); it indicates that in each instance a judgment based upon the informed discretion of the trial judge must be made. The view of the court below is consistent with the Second Circuit's approach. It has concluded that, in light of all of the relevant circumstances (including the availability to the defense of a mass of material consisting both of extra judicial statements and transcripts of testimony given in other proceedings; see, *e.g.*, R. 212–213, 656, 665, 872–873, 892), there was no basis for supposing variance in the grand jury testimony or for holding that the District Court had abused its discretion.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

We acquiesce in petitioner's suggestion (Pet. 45) that the Court defer action on the petition in this case, as well as on the petition in No. 945, October Term, 1958, until the courts below have finally acted on petitioner's second motion for a new trial grounded on newly discovered evidence.

Respectfully submitted.

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APPENDIX

Excerpts From Testimony of Government Witnesses on Cross-Examination Concerning Their Testimony Before Grand Juries

Kenneth Eckert:

R. 248–249 [In Open Court]:

Q. Mr. Eckert, you have testified before with respect to Mr. Travis and Mine-Mill, haven't you?—A. Yes.

Q. Would you tell us what those occasions have been if there has been more than one occasion?—A. Is that Travis and Mine-Mill or just Mr. Travis?

Q. Travis and Mine-Mill.—A. Well, I have testified in proceedings involving the Mine, Mill & Smelter Workers in the trial of Mine, Mill & Smelter Workers by the CIO, in the Senate, United States Senate investigation of Mine, Mill & Smelter Workers, The McCarran hearing in Salt Lake City, the Jencks case in El Paso, Texas, Grand Jury of Ben Gold, and the subsequent trial of Ben Gold, the Grand Jury proceedings involving Maurice Travis in Denver, and the trial of Maurice Travis, the decompliance proceedings of the National Labor Relations Board against the Mine, Mill & Smelter Workers, the Security Activities Control Board hearings on Mine, Mill & Smelter Workers.

* * * * *

Q. Did you give testimony about Travis before a second Grand Jury in Denver at any time?

Mr. KELLEY. Just a moment. The Government objects to that as being immaterial and not proper cross-examination.

The COURT. I think he can answer the question. You may answer, Mr. Eckert.

A. I don't recall any other Grand Jury proceedings involving Travis here.

Q. Well, Mr. Eckert, you stated that you testified about Travis before one Grand Jury in Denver. Can you remember when that was?—A. To the best of my recollection that was either the last part of 1954 or early 1955.

Q. Didn't you return to Denver subsequently to make another appearance before another Grand Jury in the Federal District Court?—A. I don't recall any other Grand Jury proceedings in Denver other than that one.

Mr. WITT. I am sorry, your Honor. This answer surprises me a little.

R. 251 [In Open Court]:

Q. You have already testified that you gave testimony before the Grand Jury in this court which indicted Travis. Do you recall when that was?—A. To the best of my recollection that was either the latter part of 1954 or early in 1955.

R. 382–383 [In Chambers]:

Mr. WITT. Your Honor, there is one matter relating to the witness's testimony on cross-examination yesterday that I think I have to clear up before I go into this line, and that relates to his answer on cross-examination yesterday as to whether or not he testified before the Grand Jury in this Court which handed down the indictment in the so-called Pezzati case which is now pending before your Honor on the motion to dismiss. The witness testified yesterday afternoon, as I recall, that although he testified before

the Grand Jury which indicted Travis, and he said he thought that was either 1954 or 1955, he didn't recall testifying before a subsequent Grand Jury. Now, I have the witness's testimony here before the SACB on March 29, 1957, where I cross-examined him about this matter. We could not find this reference——

The COURT. I might ask him again, if you have any doubt about it, if he testified before any subsequent Grand Jury here.

Q. I will ask you, Mr. Eckert, did you testify a second time in this Court before a Grand Jury after you testified in the Travis matter?—A. Yes; I subsequently recall that I have been here before the Grand Jury.

Q. And when was that, Mr. Eckert?—A. That was either 1956 or 1957 to the best of my recollection.

Mr. WITT. This one matter, since the witness's testimony yesterday was before the Jury, we will return to it when we go before the Jury to get the record straight before the Jury.

The COURT. All right.

R. 396–397 [In Chambers]:

Q. Now, Mr. Eckert, you testified yesterday that you appeared before a Grand Jury in this court against Travis in 1954 or 1955. Is that actually your best recollection as to the time, Mr. Eckert?—A. Yes, it is.

R. 399 [In Open Court]:

Q. Mr. Eckert, I asked you yesterday afternoon whether you testified before a Grand Jury in this court a second time. That was after you testified that you had appeared before a Grand Jury against Travis in 1954 and 1955, and I think you said yesterday that you did not recall whether you appeared before a Grand Jury in this court a second time.

Based on the discussion in Chambers in which you participated this morning, Mr. Eckert, I want to ask you whether you now recall whether or not you appeared before a Grand Jury in this court a second time.—A. Yes, I do.

Q. And did you?—A. Yes.

R. 452 [In Chambers]:

The COURT. I don't know where we left off yesterday. Somebody probably has the transcript.

Mr. DEIKMAN. The transcript at page 659 indicates where we left off yesterday. I believe that the questions were in regard to the first appearance by the witness before the Grand Jury in connection with the Travis case in this court. I believe that the witness has stated that he did appear before that Grand Jury and that he talked to attorneys previous to his testimony before the Grand Jury.

Mr. WITT. Your Honor, in this connection we have been intending to get this clear: You will recall that the witness has testified that he did appear before that Grand Jury.

The COURT. He testified to that in open court after we went back in there. What I am interested in is not going back over any of this.

Mr. WITT. No. I was about to say in open court the witness testified that his best recollection is that he testified against Travis in 1954 and 1955. So that the record will be clear on this point to be sure there is no dispute about it the record in this case shows that Travis was indicted on October 28, 1954. May it be stipulated that the witness appeared before the Grand Jury in connection with Travis in 1954 before October 28?

Mr. KELLEY. If that is the date. I don't even remember.

Mr. WITT. That is the date of the indictment. It was the Thursday before election, you remember, Mr. Kelley. That is why I remember it so well.

Mr. KELLEY. I do remember. We will stipulate to that.

R. 469 [In Chambers]:

Q. Now, Mr. Eckert, I believe you testified that you testified before the Grand Jury on the second time in Denver?—A. Yes.

Q. Now, do you recall when that was?

The COURT. I think he fixed the time yesterday, didn't he?

Mr. WITT. Yes.

Mr. DEIKMAN. That was in 1956. Can we stipulate to that, Mr. Kelley?

Mr. KELLEY. Whatever the date is.

The COURT. That was testified in open court. Mr. Witt asked him before the Jury, and he testified, if my memory is good, didn't you?

Mr. WITT. Yes; I think he said '56.

FRED GARDNER:

R. 656–657 [In Open Court]:

Q. Will you tell us in which proceedings before this one you have testified?—A. I testified in the Cleveland conspiracy trial a couple of weeks ago. I testified before grand juries in Denver, Cleveland, and New York.

Q. Will you give us the dates when you testified before the grand juries taking them one by one?—A. Well, I testified in Denver I believe it was in the summer of '56. I don't recall just what month that was. I testified in Cleveland before the grand jury about January of '57. I testified in Denver in the summer of '57—no; I think that would be the summer of '56 in Denver, and——

Q. I am sorry. That is what you said before.—A. It occurs to me I am a little confused as to these dates, but I think that was the summer of '56.

Q. When you say "that" what was that?—A. The Denver Grand Jury.

R. 811 [In Chambers]:

Q. Now, you also testified that you appeared before the Denver Grand Jury in the summer of 1956, the Cleveland Grand Jury in January of 1957, and the New York Grand Jury in December, 1956 or around that time. Were there any other grand juries in which the subject of inquiry was a violation of the Taft-Hartley Act, the Smith Act or any other act of that kind before which you appeared?—A. No, sir.

WILLIAM MASON:

R. 875-876 [In Open Court]:

Q. Mr. Mason, did you testify before a grand jury in this court in 1954?—A. Yes.

Q. Mr. Mason, did you testify before a grand jury in this court in 1956?—A. I don't understand the question as it relates to "court".

Q. In this courthouse, in this building.—A. Yes.

Q. Mr. Mason, on these occasions when you testified, I am referring to all of them, the two Travis trials in this court and the two grand juries and your appearance before the NLRB in May, 1954, were you paid a per-diem and a witness fee?—A. I think I was paid a witness fee.

Q. And were you paid a per diem?

The COURT. What do you mean by that?

Mr. WITT. I am sorry, Your Honor. I intended to say mileage and a witness fee.

Q. I am asking you now, Mr. Mason, whether you received mileage and witness fees in connection with these appearances as a witness.—A. Yes.

Q. And in connection with any of the appearances did you receive so-called expert witness fee?—A. No.

R. 962 [In Chambers]:

Q. Mr. Mason, I think you testified in open court that you appeared before the grand jury here in 1954 before Travis was indicted, is that right?—A. I don't recall whether I answered it or whether there was an objection from the Government attorneys, but I did testify before the grand jury.

R. 963 [In Chambers]:

Q. Did you have occasion, Mr. Mason, to appear before a grand jury in Denver in 1956?—A. Yes.

R. 966 [In Chambers]:

Q. Have you had occasion to appear before any other grand juries besides the ones that we have already mentioned and about which you have testified which grand juries elicited your testimony in regard to any violations similar to the Taft-Hartley Act, Smith Act, or anything in that area?

Mr. KELLEY. The Government objects to that as incompetent going into what was considered before a grand jury, any grand jury. If he wants to ask if he attended, went to some place for the purpose of giving testimony, that is one thing, but asking him if he testified before a grand jury as to a certain matter is improper.

The COURT. I am inclined to think that's right, but I think what Mr. Deikman's question was was before any grand jury in which that matter was involved, and that was with respect to what he testified to.

Mr. KELLEY. If he goes into Smith Act and so forth, that is irrelevant too.

The COURT. Let's find out what the fact is, whether he testified before any other grand juries that were investigating any of these matters, not with respect to what his testimony was. Did you appear before any other grand jury that involved any of these matters?

The WITNESS. Besides the two?

The COURT. Besides the two here in Denver.

The WITNESS. No.

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